UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v.

BRUCE GARELICK,

Defendant.

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New York, N.Y.

23 Cr. 307 (LJL)

Trial

April 29, 2024
9:20 a.m.

Before:

HON. LEWIS J. LIMAN,

District Judge
and a Jury

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: ELIZABETH A. HANFT
MATTHEW R. SHAHABIAN
DANIEL G. NESSIM
Assistant United States Attorneys

SHAPIRO ARATO BACH, LLP
Attorney for Defendant Garelick
BY: ALEXANDRA A. E. SHAPIRO
JONATHAN BACH
JULIAN S. BROD
JASON A. DRISCOLL

Also Present:

Special Agent Marc Troiano, FBI
Paralegal Specialist Grant Bianco, USAO
Philip K. Anthony, DecisionQuest
Sophie Payne

(Case called)

THE DEPUTY CLERK: Starting with counsel for the government, please state your appearance for the record.

MS. HANFT: Good morning, your Honor. Elizabeth Hanft, Matthew Shahabian, and Danny Nessim for the government. We're joined at counsel table by Special Agent Marc Troiano of the FBI and paralegal specialist Grant Bianco with the U.S. Attorney's Office.

THE COURT: Good morning.

MR. BACH: Good morning, your Honor. Jonathan Bach, Alexandra Shapiro——

THE COURT: Mr. Bach, you have to talk a little bit louder.

MR. BACH: Jonathan Bach, Alexandra Shapiro, Julian Brod, and Jason Driscoll for the defendant Bruce Garelick, and assisting us for this portion of the trial only is Philip Anthony.

THE COURT: Good morning.

All right. We're waiting for the jury pool to come up. Before they do, a couple of preliminary matters to discuss.

Let me start again. My microphone is now working.

So we're waiting for the jury pool. We should have them at about 10:00, I think not before then. There are a couple of preliminary matters to go over with the parties.

We distributed our proposed voir dire to the parties last week. In that proposed voir dire, at a couple of places, it states that I am going to seat 36 jurors for the purposes of voir dire and select four alternates. That's a mistake. My plan is to have two alternates, and therefore it means that we will qualify 34 jurors. So I will make that change as I deliver the voir dire.

Second, I did receive from the defense some objections and suggestions with respect to the voir dire. I have adopted the language that would add to question 4 "both oral and written communications in direct messages." I've denied the other proposed changes to the voir dire. I found the language to be confusing and not necessary to ensure that we have a fair and impartial jury.

The parties requested that we start with opening statements tomorrow. Is that correct, Ms. Hanft?

MS. HANFT: Yes, your Honor.

THE COURT: And Mr. Bach?

MR. BACH: Correct.

THE COURT: So what I propose to do, unless there is an objection, is to wait until tomorrow morning to swear the jury, at the end of the day today, after we have our 12 jurors and our two alternates, to give them the instructions with respect to conduct as jurors——in other words, the instructions about communicating with others on the case and not to research

and the like that are reflected in my preliminary instructions. But I will not have them sworn and I will not otherwise give the preliminary instructions. Any objection to that, Ms. Hanft?

MS. HANFT: No, your Honor, not from the government.

THE COURT: Mr. Bach?

MR. BACH: No, your Honor.

THE COURT: Okay. I think that takes care of it with respect to the voir dire, unless there's anything else from the defense.

MR. BACH: Just one question on procedure. We received your direction on how the peremptories will be exercised. If either party does not exercise peremptories in a round, are they deemed waived or can they be reserved for a later round?

THE COURT: Ms. Hanft, do you have a view on that?

MS. HANFT: The government's position is they should then be waived for that round.

THE COURT: That would be my instinct. I mean, of course if you elect for the jury not to exercise a peremptory challenge, you'll still have your peremptory challenges with respect to the alternates, but your peremptory is waived with respect to that round.

Okay. Anything else, Ms. Hanft, on the voir dire?

MS. HANFT: Your Honor, there are two other names that

the government would like to add to the list. We circulated a list to the Court over the weekend. Did the Court receive that list?

THE COURT: I did.

MS. HANFT: We'd like to add E.F. Hutton and Benchmark.

THE COURT: E.F. Hutton and Benchmark? All right. Let me mention one thing with respect to names and then let me ask some questions about that.

On the names, we had prepared the voir dire and the questionnaire, more importantly, before we received the list of names from the government yesterday. So what we have done on the questionnaire is to add to the back of the questionnaire the names that we received from the government yesterday that we had not previously received, and what I intend to do is when we get to the relevant question, which is at 33, "Do you, a family member, or close friend know any of these individuals," I will read through the names that are in question 33 of the questionnaire and then I will direct them to the final page of the questionnaire packet, which has the additional names that were added on Sunday. I think that that takes care of it.

With respect to E.F. Hutton and Benchmark, Ms. Hanft, I'm hesitant. I don't think that fits within the "Do you know any of these individuals," and it's hard to imagine anybody, you know, being unfair because they've heard the name E.F.

Hutton or what further examination I would do.

MS. HANFT: Understood, your Honor. I think if it's going to stand out in a strange way, I think it's probably fine and we'll withdraw that request.

THE COURT: Let me ask Mr. Bach. Do you want me to question the jurors about E.F. Hutton and Benchmark?

MR. BACH: No. We don't think it's necessary.

THE COURT: All right. So I'm not going to do that.

Okay. I received the motion to quash the "if, as, and when" subpoena. I'm not going to entertain argument with respect to that now. What I am going to do is direct the parties to meet and confer and to send me a letter tonight, and I'll entertain from the parties what time tonight, as long as it's not too late, to identify any portions of the "if, as, and when" subpoena that require me to make a decision. Ms. Hanft, how long do you need to meet and confer and to——it's a short trial day today.

MS. HANFT: Your Honor, would 9 p.m. work for the Court?

THE COURT: Mr. Bach, does that work for you?

MS. SHAPIRO: That's fine.

THE COURT: Okay. All right. By 9 p.m.

On the charge, I received from the defense their further objections and their letter, which was very helpful. If we've got time at the end of the day today, I'll hear from

the government with respect to any items that they wish to bring to my attention, and then what I anticipate doing is at some point during the trial, probably not today, permitting the parties to argue with respect to specific requests as to which it would be helpful for me to have argument, which I will let the parties know.

I do anticipate in this case, absent objection, giving the jury hard copies of my instructions for them to follow along as I deliver the charge, at the conclusion of the trial. Ms. Shapiro, Mr. Bach, do you have any objection to me doing that?

MS. SHAPIRO: Your Honor, we don't object. The only thing——this may sound like an odd request, but——

THE COURT: Try to speak into the microphone. Maybe lift up the microphone.

MS. SHAPIRO: Sorry.

This may sound like an odd request, but we had——we would ask that the Court consider, if it is going to do that, removing the headings and the table of contents for the following reason: We are involved in another case in which, after the verdict, a number of jurors spoke to the media, and it seems pretty clear that they were confused because they relied on the headings and the table of contents as trumping like the actual language. So that's the only request we would make, if the Court is inclined to provide the written charge to

the jurors.

THE COURT: I think that's a reasonable request. Ms. Hanft or Mr. Shahabian?

MR. SHAHABIAN: I don't know that I have a strong view one way or another right now. I guess giving the jurors——the current charge numbers about 50 pages. If they're trying to find a particular instruction, it might be difficult. Maybe if there are particular issues with the language in the headings, we can——we're fine toning it down or writing it in a way where people aren't going to be relying on that over the actual instructions, but an index is certainly going to be helpful.

THE COURT: Why don't the two of you talk about it. If you don't come to an agreement, I'm inclined to agree with Ms. Shapiro's point. I don't ordinarily read the headings when I give the charge, and for that reason, I think her objection is well taken that what goes into the jury room need not have the headings, and certainly if they're reading along, they're going to be reading along what I'm saying, which doesn't have the headings, but I understand your point, Mr. Shahabian, and if the parties come to an agreement on it, then I'll give something with an index.

MR. SHAHABIAN: Understood, your Honor.

And one proposal that the government would suggest is an additional instruction that the index or table of contents are not instructions and they're guides, but the instructions

are, you know, what the Court actually tells the jurors.

THE COURT: I would do that if they get the index and the headings.

Okay. I am prepared to rule with respect to Mr. Garelick's additional motion *in limine*. I'll give you the rulings there.

First, Mr. Garelick's motion to preclude evidence of his past employers' compliance policies and practices is denied. "As the Supreme Court has observed, '[t]he Rules' basic standard of relevance . . . is a liberal one.'" *United States v. Kaplan*, 490 F.3d 110, 121 (2d Cir. 2007) (quoting *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 587 (1993). Evidence is relevant, and thus presumptively admissible, if it tends to make any fact of consequence "more or less probable than it would be without the evidence." Fed. R. Evid. 401(a). Compliance policies and documents from Mr. Garelick's prior employers are relevant under Rule 401 to his state of mind, particularly willfulness, when he engaged in the trading at issue. The policies tend to make it more likely that, assuming Mr. Garelick traded on material nonpublic information, he did so with a bad purpose to disobey or disregard the law. While Mr. Garelick suggests that these documents are too old to be relevant, that objection goes to their probative weight rather than their admissibility. Mr. Garelick also states that he will not contest that he had a general understanding that it

was wrong and illegal to trade or tip using material nonpublic information. But the government is "entitled to prove its case free from any defendant's option to stipulate the evidence away." *Old Chief v. United States*, 519 U.S. 172, 189 (1997).

Mr. Garelick's primary argument against these compliance policies and documents, however, is not based on Rule 401 but rather on Rule 403. He argues that the policies and documents include overbroad definitions of legal concepts such as confidentiality, tipping, and material nonpublic information. In short, the concern appears not to be that the documents are irrelevant to showing a bad purpose on the part of Mr. Garelick, but that the jury would be confused into thinking that the policies accurately state the law to be applied by the jury. The Court can adequately address that risk of confusion by instructing the jury that the documents are being received only for a limited purpose, that they are not a substitute for the law, and that the jury must instead apply the Court's instructions. *See United States v. Pacilio*, 85 F.4th 450, 466 (7th Cir. 2023). Mr. Garelick argues that such an instruction would require the jury "to perform humanly impossible feats of mental dexterity." The Court disagrees and notes that several courts within this district have used similar instructions in cases involving compliance policies. *E.g., United States v. Afriyie*, 16 Cr. 377 (Engelmayer, J.); *United States v. Walters*, 16 Cr. 338 (Castel, J.); *United*

States v. Stewart, 15 Cr. 287 (Swain, Chief Judge); *United States v. Riley*, 13 Cr. 339 (Caproni, J.); *United States v. Martoma*, 12 Cr. 972 (Gardephe, J.). Finally, while Mr. Garelick cites *United States v. Scop*, 846 F.2d 135 (2d Cir. 1988) and *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991), those cases addressed the distinct concerns that arise when an expert witness opines on the meaning of legal concepts. In any event, the reasoning of *Scop* and *Bilzerian* support admitting the policies here subject to a limiting instruction, as both recognized the critical distinction between evidence that supports "ultimate factual conclusions" and that which offers merely "legal conclusions." *Scop*, 846 F.2d at 139, 142; *accord Bilzerian*, 926 F.2d at 1294. The Court's instruction will reinforce that distinction and ensure the jury considers the compliance documents and policies solely for the former purpose and not the latter.

Second, Mr. Garelick moves to preclude evidence of what DWAC board members and managers considered permissible, material, or nonpublic. That motion is granted in part and denied in part. The Court will permit DWAC board members and managers who received similar information to that received by Mr. Garelick at approximately the same time Mr. Garelick did to testify to their understandings as to whether the information was confidential, nonpublic, or important, and to testify to their practices as to how they treated the information. Under

United States v. Mahaffy, 693 F.3d 113 (2d Cir. 2012) and *Carpenter v. United States*, 484 U.S. 19 (1987), evidence regarding "the ways in which other employees may access and use the information" is relevant to whether the information at issue is confidential and nonpublic. 693 F.3d at n. 14. The Court would permit Mr. Garelick to call board members and DWAC employees to testify to their understandings that the information at issue was not confidential, that they could trade on it, and that they did trade on it. Such evidence would tend to undermine the notion that the information at issue was nonpublic and confidential. By parity of reasoning, the government is entitled to offer evidence that other board members and DWAC employees understood that the information at issue was confidential and that they could not trade on it. The proposed testimony also is permissible lay opinion testimony under Rule 701, in that it would be: rationally based on the witnesses' firsthand observations at DWAC; probative of whether DWAC treated the information as confidential; and not based on scientific, technical, or other specialized knowledge. On the other hand, the Court will not permit the witnesses to testify (unless a door is opened) as to whether they believed a given course of action would be legal or illegal. Testimony regarding the purported legality or illegality of an action would violate the fundamental principle that witnesses cannot "present testimony in the form of legal conclusions." *Cameron*

v. City of New York, 598 F.3d 50, 62 (2d Cir. 2010).

Finally, Mr. Garelick moves to preclude the government from introducing Government Exhibits 1, 2, and 3, which Mr. Garelick describes as "mugshots" of him, Michael Shvartsman, and Gerald Shvartsman, respectively, from the morning of their arrests. That motion is granted. The photographs are recognizable as mugshots. Even though they do not bear any kind of a legend explicitly linking them to law enforcement, each of the photographs is taken against the same solid background with the individual directly facing the camera. The common background and framing of the photographs would suggest to an attentive juror that all three individuals were arrested together, thereby undermining the Court's instruction to the jury in this case not to consider or speculate as to why other persons are not presently on trial. Under *United States v. Harrington*, the government "must have a demonstrable need to introduce the photographs." 490 F.2d 487, 494 (2d Cir. 1973). But the government does not contest that it has numerous other photographs of the defendants that it could use for that same purpose and with equal permissible effect. Moreover, the probative value of these particular photographs is substantially outweighed by their prejudicial impact.

All right. So that addresses that.

On the motion *in limine* that I received from the

government over the weekend, is the defense prepared to address that motion while we're waiting for the jury?

MR. BACH: Yes, your Honor. But can we ask for one point of clarification on your ruling——

THE COURT: Yes.

MR. BACH: ——from the prior motion. One moment, please.

THE COURT: You can ask, I'm not sure if I will give, but you can certainly ask and I'll consider the request.

MR. BACH: May I consult with my colleagues for a moment.

So Judge, we understand the line the Court is drawing between an opinion as to what's confidential and an opinion as to what's legal. And we just have a question about where something might fall, whether——on which side of that line.

So for instance, if the government's witnesses were to testify that they understood that directors can't trade and that was based on their general understanding of the law or that the directors can never trade when they sit on a public company that's actively involved in a stock, that they have an understanding that they can't trade, we believe that such an understanding is, in essence, their understanding, their lay opinion of what the law or the rules are in that circumstance. It's not something other than that. And therefore, we think that that would be precluded by the Court's ruling.

And I have a second point I want to raise.

THE COURT: I think I would prefer to address that question as it comes up, depending on what the government asks.

MR. BACH: Okay. And then the second point I want to raise with the Court——and this wasn't clear in the letter correspondence, but we've had subsequent correspondence with the government about it since we submitted our brief. One of the government's anticipated witnesses tomorrow, Mr. Swider, is anticipated to testify that he accidentally purchased one share of DWAC stock. He was——as I understand it, he was attempting to set up a tracking device on his iPhone to follow the stock's performance, and by opening up that app, he inadvertently purchased a share. You have to be an owner to track it. And then his testimony would be, in essence, that he got extremely nervous 'cause he realized he hadn't filled out the proper forms, and he knew he had to fill out these forms and he was nervous. We just think that this is an idiosyncratic, one-off piece of conduct that's not relevant to the case. We told the government that we would not cross-examine Mr. Swider on his failure to file forms based on this clearly erroneous, one-off incident, and we asked them if we didn't plan to cross-examine, if they would refrain from eliciting it, because just that piece of conduct doesn't seem relevant to anything in the case. They said they do nevertheless plan to elicit it on direct, and we object. We think that conduct is the tail wagging the dog.

It's just an opportunity for the government to have a director talk about his state of mind, his opinions in an idiosyncratic situation about whether he had obligations, whether he was concerned about the law, and we just don't think——we think it should be excluded from the trial.

THE COURT: Ms. Hanft, do you want to address that?

MS. HANFT: Yes, your Honor.

I think that there are actually two issues embedded in Mr. Bach's question. So one is that the government does anticipate that Mr. Swider will testify about an incident in which he accidentally purchased a DWAC share and sold it right away. And I anticipate his testimony will be, in part, that he——when asked why he sold it right away and why he was nervous when that happened, will be that he knew he was in possession of confidential information and was not sure yet if he had been, quote, cleansed of that information, if the information was sufficiently public, because this happened after the announcement of the merger, and so the government submits that per *Mahaffy*, *Carpenter*, and the cases cited by the Court, his view on whether the information he received as a board member of DWAC is someone similarly situated to Mr. Garelick is absolutely relevant to how other insiders treated the information they received and to how the company treated the information. And so the government submits that that should be——that that's admissible.

THE COURT: You said——hold on for a second, Mr. Bach. You'll be given an opportunity.

Ms. Hanft, you said that there were two issues embedded. So what's the second one?

MS. HANFT: Yes. The second issue I believe is that Mr. Bach is talking about Mr. Swider's failure to file forms, and so I believe what he's referring to is a conversation in which Mr. Swider——it's a text message conversation in which Mr. Swider messages Patrick Orlando and says, could you please ask——something along the lines of, could you please ask attorneys whether——I can't remember exactly, something about whether it's okay to trade, and he says, it should be fine as long as we report it, or something along those lines. And, you know, to the extent that that part——the Court would like that part redacted or something along those lines, I think the government's point of eliciting this is really as to the former. And so I think the conversation really corroborates Mr. Swider's testimony, but if the question of reporting the forms is, you know——the Court deems it——the government thinks it should be admissible, but frankly, your Honor, we're happy to redact that part out.

THE COURT: Mr. Bach.

MR. BACH: Did I hear Ms. Hanft correctly that this incident arose after the merger was publicly announced?

MS. HANFT: I believe it was, your Honor.

THE COURT: The trade took place before or it took place right after the merger was announced?

MS. HANFT: I will confirm this, your Honor, but I believe it was——Mr. Swider's trade was on either the 20th or the 21st.

MR. BACH: Okay. But then it's even more irrelevant because his nervousness is clearly misplaced once this information is in the public domain. I think the Court gets a sense of this. This is not someone sitting at a board meeting where Mr. Garelick is also present, hearing the same kind of direction or information that Mr. Garelick would have heard. This is someone who obviously pushed the wrong button on his phone and got nervous for reasons that were not necessarily justified.

THE COURT: So I think the first portion of this is relevant. I'm not sure that the anxiety is relevant, and I'll entertain objections with respect to that if that is elicited because that then does tend to go to anxiety about, you know, is the person violating the law. But as I understand the proffer from the government——and Ms. Hanft will correct me if I'm wrong——the information at issue was information that was derived from the individual in his capacity as a director at the time that the information had not been publicly announced and therefore does go to the question of whether the information at issue was delivered with a mutual understanding

that it would be kept confidential. Am I correct, in terms of the information at issue, that it was information that was delivered to the individual in his capacity as a director prior to the public announcement?

MS. HANFT: When he received the information, yes, your Honor, and so contrary to what Mr. Bach just said, it absolutely is someone similarly situated to Mr. Swider who was sitting in the same board——to Mr. Garelick, who was sitting in the same board meetings and receiving the same information.

THE COURT: Okay. So you've got my ruling on that, Mr. Bach.

MR. BACH: I understand. I'm just not sure I understand the chronology. I thought this incident occurred after the public announcement.

THE COURT: I think I understand it. So——

MR. BACH: All right. Okay.

THE COURT: So the question then is, on the government's motions *in limine*, do you want to address those now? We may have a couple of minutes before the jury arrives. Or we could do it later in the day. But I would prefer if we could at least get started while we're waiting for the jury.

MR. BACH: Sure.

So I think their first motion seeks to preclude any cross-examination of Mr. Litinsky about a conversation he had with Patrick Orlando about——

THE COURT: I assume that's who Witness No. 1 is; is that right?

MR. SHAHABIAN: That's correct.

MR. BACH: Yeah. And Judge, we haven't heard the direct testimony yet, and the way this issue arose was the government advised us of three small criminal offenses engaged in by some of its witnesses——I think, you know, college drinking or——and Mr. Litinsky apparently may have violated a Florida two-way consent law relating to tape recording another individual. And they asked us if we plan to cross-examine their witnesses on that. And we said no; we have no desire to get into these peccadilloes. We're not going to be cross-examining. But in the same breath we made clear that of course the defense reserves the right, if there are relevant communications, if there's relevant conduct in the case——we're not going to bring out that this was illegal or anything of the sort, but we're certainly allowed, depending on the direct and the evidence in the case, to cross-examine people about relevant communications. So it's a little premature because we haven't heard the direct, but we do think that there are compelling evidentiary reasons that we should be allowed to do that. The appropriate time to have that argument might be after the direct, but——and I certainly don't want to preview for the government what my cross-examination may be, but on that one, it's standard for the defense to be able to examine

people about relevant communications and about the relevant chronology, without getting into whether they violated the Florida two-way consent law.

THE COURT: How long does the government expect that the testimony of Mr. Litinsky will last, the direct?

MR. SHAHABIAN: I'd say approximately an hour, your Honor.

THE COURT: All right. Let me hear your argument on point two. I may go back to point one.

MR. BACH: Okay. Judge, the second motion the government made is one that was already discussed with the Court, and that was the question of an email that Mr. Garelick wrote to the compliance officer at Rocket One.

THE COURT: And I think I said as to that that it would have to fit within a hearsay exception.

MR. BACH: Yes, that we'd have to follow the rules of evidence, and just to be clear——I know the Court knows this, but——we're going to follow the rules of evidence.

THE COURT: Well, I assume that you will, and if you don't, I will make you do so to the best extent that I can. But can you tell me how that email would be admissible and would fall within a hearsay exception.

MR. BACH: Sure, Judge, I will tell you that we will follow the rules of evidence. That's what I will tell you. And if the Court feels we're not following the rules of

evidence, it can strike it. But we've already argued this and we understand the government's points.

THE COURT: Okay. Do you have anything else to say on point two?

MR. BACH: Again, I think the Court should wait on that and see where we are. It's not going to——

THE COURT: Why? Why should I wait?

MR. BACH: Hold on.

Judge, we're happy to have an *in camera* conversation about these things. We understand the hearsay rules. We think——we talked about that I would not be opening on this, and the government has raised this point again. I don't know why they're entitled to an anticipatory, kind of advisory opinion on this at this stage. We, you know, we're entitled to present our case, and we have to do that within the bounds of the law, and within the rules of evidence, and the Court has already addressed this, and I think the Court addressed it properly.

THE COURT: So Mr. Bach, I'm going to do it this way. By the end of the day today, meaning by 9:00, which I think we've all agreed is the end of the day today, if there is legal authority that you want me to consider with respect to the admissibility of this exhibit, you'll let me know what that legal authority is, because I'm entitled to know what your legal authority is, and if you want me to issue an informed decision with respect to the admissibility of it, then you're

entitled to give me that legal authority. So give it to me by 9:00 tonight and I will try to give you all an informed ruling.

Ms. Hanft.

MS. HANFT: I just want to understand whether Mr. Bach is in fact committing to not opening on that email, because he didn't actually previously commit to that and now he is saying that the Court has——that he's already said that.

THE COURT: I think he is.

Mr. Bach?

MR. BACH: Of course.

THE COURT: Okay. So 9:00 tonight with respect to legal authority.

MR. BACH: Sure. In response to the government's points, sure.

THE COURT: Okay. And then are you going to open with respect to an alternative tipping chain, that the tip came from somebody else?

MR. BACH: Well, that's a——the Court is phrasing the question in a certain way.

THE COURT: Okay.

MR. BACH: Our position——our position is that there are certain trades, not all of them, the government in its letter is focusing on some early trades. I think it says that some of these trades follow a certain chronology. We're not going to say that all of the trades here are the subject of an

alternate tipping scenario. But we are going to present a defense in this case. I think that there are trades toward the end of the time frame here that are probably pretty clearly instances of insider trading. The government is going to have two witnesses testify that they're employees of Gerald Shvartsman and they were tipped by Gerald Shvartsman and they don't know who the source of Gerald Shvartsman's information was. We are entitled to present competent evidence to show that the source was not Mr. Garelick but somebody else. That's our defense. Without that defense, it would be a directed verdict.

THE COURT: Well, no. I mean, there are two parts of what you said.

MR. BACH: Yes, yes.

THE COURT: One is that you're absolutely entitled to put on the defense that the source was not Mr. Garelick, or, put more precisely, that the government has not shown beyond a reasonable doubt that the source was Mr. Garelick.

MR. BACH: Right, right.

THE COURT: But if you are——if you want to suggest to the jury that the source was somebody else——

MR. BACH: Yes.

THE COURT: ——then you are required to have some form of a factual predicate for that; otherwise, you're just asking the jury to speculate.

MR. BACH: Of course.

THE COURT: So as to that portion——

MR. BACH: Yes. We will have a very substantial factual predicate for it. The government, in its letter, relies solely on the *Gupta* case, and the *Gupta* case, the Court of Appeals was concerned about the hearsay nature of the evidence, unchaperoned by any witness testimony, and it was also concerned that the purported alternate tipper, there was no evidence that that alternate tipper had access to the material nonpublic information. Our defense will be different on both counts. We will present substantial, competent evidence, including witness testimony, that shows that there was an alternate tipper in this case, and perhaps more than one. We will do it with a solid evidentiary basis. It's part of our defense.

I will note that when the government applied for search warrant applications in this case, it flagged this issue specifically to the judge. It noted——and I'm reading a footnote in a search warrant application that was submitted in Rhode Island, where Mr. Garelick——and here's what the footnote says. "Alternatively, Orlando may have informed some of these individuals directly of the planned business combination between DWAC and Trump Media, and individuals traded on that tip." So there's certainly enough here for the government to feel compelled to tell a court, in seeking a warrant, that

there's an alternative tipper reality here. And I am prepared——we can go *ex parte*, we can go into chambers, and we will detail for the Court the substantial, competent, nonhearsay witness-based evidence that we'll present, which already distinguishes us from *Gupta*, and we will show, delineate for your Honor that it is based on people who do have access to the material nonpublic information at issue in this case. They cite no other authority for the very extreme proposition that the defense should be curtailed from introducing this evidence. Imagine a murder case in which there's a question of alternate suspects, and, sure, the defense is entitled to say to the jury, as your Honor just recited, they haven't proved beyond a reasonable doubt that our client was the murderer and, you know, and there's evidence to suggest that he wasn't. But it's a much more powerful defense, one that defendants are allowed to present, to say, here is who did it, and there's competent evidence to show you who did it and how it happened. So it's not just a question of reasonable doubt; it's a question of substantive proof through competent evidence, and that we represent Mr. Garelick. Mr. Garelick is presumed innocent. He did not tip anybody. Especially did not——those later incidents in October can be explained through other evidence. To preclude us from doing that would hamstring our ability to defend him in very substantial ways. This is not the *Gupta* case. It's far from it. I'm very concerned

about detailing the details of our defense here because they can talk to their witnesses before I do it. I'm happy to do it *in camera*. But the idea that this is just some baseless, nonevidentiary, speculative hypothesis is wrong, and we think the government doesn't understand its own evidence and its own documents, and when you read their letter, they're saying Mr. Orlando and Mr. Wachter told them certain things and that——as if those are statements that can be taken at face value. Neither of those witnesses have been cross-examined.

(Continued on next page)

THE COURT: What I understand them to be saying is that they're not aware from their investigation of a factual predicate for your argument that Mr. Orlando or Mr. Wachter were the alternative source of the information, and you haven't proffered anything to suggest that they are the alternative source. Therefore, putting in front of the jury the argument that they're the alternative source is calling for the jury to speculate, putting forward limited information with respect to that.

MS. SHAPIRO: If we had no basis and it were speculative, I understand the point, but that's not the situation. We have no obligation to proffer to them. That would really be unfair to require us to lay out our defense first in order to be able to present it.

THE COURT: I don't think you answered my question as to whether you're going to open --

MS. SHAPIRO: I am going to open softly. I am not going to identify anyone in the opening, but I'm going to open softly that there may well be other people who are responsive that might well be insider trading in this case, and there may well be tips, and it may well be by others besides Bruce Garelick. I think I'm entitled to open on that. I don't see how I can be precluded.

THE COURT: Let me hear from the government. Mr. Shahabian.

MR. SHAHABIAN: Yes, your Honor. Would the Court like me to start with this alternate tipping chain issue or start with the first motion?

THE COURT: It's up to you.

MR. SHAHABIAN: I can start with this if it's the current topic of conversation. This is exactly what came up in Gupta. If the defense wants to open on a theory that there was another tipper, they're inviting the jury to speculate absent any factual predicate in the record to offer that inference. They're not required to preview their defense for us, but the point of a motion in limine is to avoid poisoning the jury with speculation for which there's not going to be a sufficient factual predicate.

What the defense has done is marked a lot of exhibits, hearsay exhibits about trading, text messages, phone calls. As the government has proffered in its letter, if you line those up, those aren't in support of an alternate tipping chain. As in the Gupta case, there's no witness the government is aware of who's going to testify and lay a basis for a factual predicate.

For example, Mr. Wachter, we anticipate, is going to testify, I introduced the defendant and others to Mr. Orlando in the summer of 2021 to invest in DWAC. I was not on the board and did not receive any updates on the negotiations. In fact, I transferred 100,000 shares a week before the merger

announcement, not knowing this announcement was coming. And so, I lost out on millions because nobody told me, including Patrick Orlando, what was happening.

So the idea that Mr. Wachter is the source of a tip in October is frankly ludicrous based on what the government is aware of. If there is a factual basis for this alternate tipping chain, there should be a proffer on it before we start inviting the jury to speculate on openings on who the tipper actually is.

THE COURT: And do you have a view as to whether I should receive that *ex parte*?

MR. SHAHABIAN: Yes, your Honor. I think in order for there to be a sufficient basis to make a ruling in line with Gupta, it shouldn't be *ex parte*, it should be on the record. This isn't a Rule 17(c) subpoena. This is asking to present arguments to the jury.

This was raised in the basis of marking exhibits that appear to be hearsay. All of these appear to be irrelevant and a distraction, unless there's some proffer for how they're going to be tied to an actual theory that's not just speculation. It's the same as any other factual proffer for admitting evidence before it's already before the jury and then we're trying to unring the bell.

THE COURT: Let me hear from you on the alternative tipper.

MR. SHAHABIAN: Sorry. On --

THE COURT: Alternative tipper theory. I'm sorry. That's what you addressed. On the Orlando cross examination, cross examination of Litinsky about the Orlando recording.

MR. SHAHABIAN: Yes, your Honor. And to be clear, we understand the defense isn't going to cross on the Florida two-party consent issue. That's not what this motion is about. This is a species of what we previously briefed before the final pretrial conference, about confusing the jury with a distracting sideshow on the SEC disclosure violations and whether DWAC had improperly selected Trump Media as the target. We see no basis as to cross examine Mr. Litinsky on this point. It looks like an attempt to impeach Patrick Orlando. This doesn't seem proper under any theory of impeachment evidence. And so, for that reason, we would ask that it be excluded.

Again, these are in limine rulings. The government is certainly not entitled to in limine rulings, but Mr. Litinsky's going to be our first witness. The defense knows what he's going to say about this from the 3500 material. If there's a relevant permissible reason to cross examine on this, I think it's in efficiency to do that now and not once he's on the stand and have a break before cross examination or in the middle of cross examination.

THE COURT: Let me ask you, on the alternative tipper argument, I take it that you have identified the documents at

issue that you believe have no permissible purpose and are not admissible. Is there any reason why you wouldn't let me know what those documents are so that I can address the issue concretely?

MR. SHAHABIAN: It would take some time. We received the defense exhibits recently. It's a lot of trading records, text message chains, phone records, some of which we wouldn't contest are inadmissible, they're business records, but they seem irrelevant since it would just be inviting speculation from this hearsay theory. So we can pull them together and submit them to the Court for the Court's review. I realize this is a little vague, but we just want to be thoughtful about what our objections are to particular pieces of evidence.

The reason we wanted to flag this in the motion in limine is precisely to the point Mr. Bach made about opening on this theory, suggesting to the jury not just that the government won't be able to prove that Mr. Garelick was the tipper, but injecting the speculation that there was in fact a second source. That's what we're really seeking to get a ruling on now. We can submit all the documents to the Court after court this evening that the defense has produced to us so the Court can see the phone records and trading records and so on, but we're not actually asking for a ruling on particular documents at this moment.

THE COURT: Last question for you before I turn back

to Mr. Bach. If, in fact, his opening is as soft as he's represented it to be, which is to the effect of, you may hear evidence that there was an alternative source, keep your minds open. What's the particular prejudice with respect to that at this point?

MR. SHAHABIAN: I think it's still prejudicial because it goes beyond the typical defense opening of, hold the government to its burden and they need to prove every element. It injects effectively an affirmative defense. If there's another tipper here and keep your ears peeled for that, and if there's no actual testimony or admissible evidence that's going to come in to support that theory, it's just poisoning the jurors' attention from "jump" without any actual evidence that's going to support the soft promise.

THE COURT: Mr. Bach, on the cross examination of Litinsky, unless you're prepared to make an argument to me or unless a door is opened on the direct examination, I think testimony with respect to the contents of this recording as it's been represented to me is not going to be admissible under Rule 608. If you want to respond to the government's argument, I'm going to need it before 9 o'clock, I'm going to need it by 5 o'clock today, and then I'll give you a ruling on it tomorrow morning.

MS. SHAPIRO: I can make an oral proffer now. I haven't heard the direct, but if the Court wants to hear the

argument now --

THE COURT: Yes.

MS. SHAPIRO: -- as to how it may fit it in. I think it goes to two points. I think it goes to the issue of materiality and it goes to the issue of credibility.

What happens in that conversation is that Mr. Litinsky is very clear that they should not be discussing --

THE COURT: When you say "credibility," whose credibility?

MS. SHAPIRO: Mr. Orlando.

THE COURT: So let me hear from you on materiality and then you'll tell me why on the basis of the fact that Mr. Orlando is not going to be called as a witness, why evidence going to his credibility would be admissible. But let me hear from you on materiality.

MR. BACH: On materiality, the context for this conversation is that Mr. Litinsky and his partner are very nervous about discussing the prospect of doing business with a SPAC that has not IPO'd yet. Mr. Orlando suggests that they can talk hypothetically. This is how Mr. Orlando spoke about Trump repeatedly. What Mr. Orlando does is he said -- he dangles the Trump's name as a reality and then he caveats it by saying it's merely hypothetical, that I haven't had any discussions. There's nothing material here and you're going to see that this is part of a pattern and practice. And the

government is saying that when Mr. Orlando discusses "Trump," that it's substantive information and material and highly confidential.

I think what is relevant here is what Mr. Orlando is doing is presenting things merely as hypothetical, he's qualifying them, he's being clear that he really can't do anything of substance, hasn't had discussions. Anything is hypothetical at that point, that's number one.

But number 2, it does go to Mr. Orlando's truthfulness, his credibility, because what he's essentially saying to Mr. Litinsky is let's bend the rules here. I know we're not supposed to be talking, but let's talk hypothetically. If Mr. Orlando is not a witness in this case, that's one thing, but we are certainly going to try to introduce hearsay from Mr. Orlando at this trial. I think they're going to present him as a truth teller, as an honest guy. They just told you that they're relying on his and Mr. Wachter's statements, and we don't know if he's going to be a witness or not. They have not ruled the out the possibility that he will testify.

These are the thoughts that I have now, I haven't heard the direct, but I do think these are issues that are relevant to the case. It's not about whether anyone's being sued by the SEC or not, it's not about whether there are false statements in the S1, that's not what this is about. It's

about how these events unfold in real time and how Mr. Orlando is pitching the idea of this SPAC and his relationship with Trump at this time. Is it real, is it material, or is it hypothetical and something that's in the air? And it shows that he can't be trusted, that he plays games, and his word should not be taken at face value. So that's my proffer on that point.

THE COURT: I'm informed we have the jurors. So we'll continue the argument on this after we're done with jury selection. I don't want to keep the potential jurors waiting.Ed.

Are they outside, Mr. Fishman?

THE DEPUTY CLERK: They're collecting them outside.

THE COURT: Just give us one moment.

The jurors are outside. I'm going to step off the bench, they'll be brought in, and I'll come back in once they're here.

(Adjourned to April 30, 2024 at 9:00 a.m.)

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